

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re: EDWARD S. CHILDS

Case No. 00-6028 - WRS
Chapter 13

Debtor.

CURTIS C. REDING, TRUSTEE,
AND SUSAN S. DEPAOLA, TRUSTEE

Plaintiffs,

Adv.Pro.No. 03-1071 - WRS

v.

MORRIS BART, et al.,

Defendants.

MEMORANDUM DECISION

On April 12, 2006, the Court entered a Show Cause Order raising *sua sponte* the question of whether it has subject matter jurisdiction over the Bart claims against Gallagher and the Gallagher claims against Bart, pursuant to 28 U.S.C. § 1334(b). (Doc. 312). Both the Bart and the Gallagher Defendants have filed briefs. (Docs. 332, 333). For the reasons set forth below, the Bart cross-claims against Gallagher and the Gallagher cross-claims against Bart are DISMISSED. (Docs. 22, 38).

I. PROCEDURAL HISTORY

The Court filed a Memorandum Decision yesterday wherein it described in some detail the Plaintiffs' claims against Defendant Gallagher. (Doc. 335). That discussion need not be repeated here. Suffice to say, the Trustees brought suit against Gallagher and Bart seeking to recover property of 60 bankruptcy estates which the Trustee contends have been wrongfully paid over to the Debtors and their lawyers. In response to the Trustees' suit, Bart brought suit against Gallagher (Doc. 22), and Gallagher brought suit against Bart. (Doc. 38). Each lawyer blames the other for the problems which gave rise to the Trustee's suit and each lawyer alleges that the other breached contractual duties owed by the other. The Trustee and Bart have recently settled (Docs. 303, 336), leaving only the Trustee's claims against Gallagher. The question that the Court must now address is whether it has subject matter jurisdiction over the Bart claims against Gallagher and the Gallagher claims against Bart. For ease of reference, these claims will be referred to as the cross claims.

II. SUA SPONTE DISMISSALS

Neither Bart nor Gallagher have heretofore disputed this Court's subject matter jurisdiction over the cross claims. On April 12, 2006, the Court entered an order advising the parties that the Court would consider the question of its subject matter jurisdiction on its own motion. (Doc. 312). The Bart Defendants have filed a brief which contends that this Court does not have subject matter jurisdiction over the cross claims. (Doc. 332).

Gallagher has filed a brief contending that this Court has subject matter jurisdiction. As a threshold matter, it is appropriate for a court to consider whether it has subject matter jurisdiction, even where, as here, neither party has raised the issue. Boone v. Secretary, Dept. Of Corrections, 377 F.3d 1315, 1317 (11th Cir. 2004); Thomas v. Crosby, 371 F.3d 782, 801 (11th Cir. 2004); Arthur v. Haley, 248 F.3d 1303, 1303 (11th Cir. 2001).

III. SUBJECT MATTER JURISDICTION

A. Law

The Bankruptcy Court's subject matter jurisdiction is derivative of the District Court, which is provided by 28 U.S.C. § 1334(b), which provides as follows:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

In order for this Court to have subject matter jurisdiction over a proceeding, such as the cross claims in question here, the proceeding must either 1) arise under title 11; 2) arise in a case under title 11; or 3) be related to a case under title 11.

1. "Arising under title 11"

Proceedings "arising under" are matters invoking a substantive right created by the Bankruptcy Code. Carter v. Rodgers, 220 F.3d 1249, 1253 (11th Cir. 2000); Transouth Financial Corp. v. Murry, 311 B.R. 99, 103 (M.D. Ala. 2004); Citigroup v.

Harris, (In re: Harris), 306 B.R. 357, 362 (M.D. Ala. 2004). In this case, neither Bart's cross-claim against Gallagher nor Gallagher's cross-claim against Bart invoke a substantive right created by the bankruptcy code. Indeed, even on their face, the cross-claims involve issues of contract law. For example, in Gallagher's cross-claim, he alleges that Bart breached duties owing to Gallagher under their agreement. For this reason, the cross-claims are not proceedings "arising under title 11."

2. "Arising in"

The District Court has described "arising in" jurisdiction as follows:

"Arising in a case under title 11" category is "generally thought to involve administrative-type matters . . . or as the [Fifth Circuit] put it 'matters that could arise only in bankruptcy.'" In re: Toldedo, 170 F.3d 1340, 1345 (11th Cir. 1999)(quoting Matter of Wood, 825 F.2d 90, 97 (5th Cir. 1999)(stating that "[t]he meaning of 'arising in' proceedings is less clear [than arising under'], but seems to be a reference to those 'administrative' matters that arise only in bankruptcy cases. In other words, 'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of bankruptcy.');

see also, Carter v. Rodgers, 220 F.3d 1249, 1253 (11th Cir. 2000); see also, In re: Harris, 298 B.R. at 900.

Gallagher's claim against Bart or Bart's claim against Gallagher are claims which arise under State Law and could be brought in an appropriate State Court, or perhaps a Federal Court under diversity jurisdiction. It is not correct to say that the cross-claims "could arise only in bankruptcy." Id. Bart and Gallagher are lawyers who represented a number of clients in personal injury suits. Any number of disputes between the two law

firms might arise, none of which have anything to do with bankruptcy. To be sure, it is the bankruptcy laws which they are alleged to have violated, but it is the contractual relations and common law duties between the two firms which are the basis of the cross-claims. To be sure, the Trustees' claims against Gallagher and the Trustees' claims against Bart "arise in" a case under Title 11, but this Bankruptcy Court's "arising in" jurisdiction does not extend further downstream.

3. "Related to"

The test for "related to" jurisdiction was handed down by the Eleventh Circuit in Lemco Gypsum, which provides as follows:

"The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." We join the majority of the circuits that have adopted the Pacor formulation.

Miller v. Kemira, Inc., (In re: Lemco Gypsum), 910 F.2d 784, 788 (11th Cir. 1990)(citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984)); see also, Continental National Bank of Miami v. Sanchez (In re: Toledo), 170 F.3d 1340 (11th Cir. 1999); Shearson Lehman Brothers, Inc. v. Munford, Inc. (In re: Munford), 97 F.3d 449 (11th Cir. 1996).

In this Court's Order of April 12, 2006, it stated that "whether Bart owes Gallagher, or Gallagher owes Bart, does not appear to be a matter which will have any effect on any of the related bankruptcy estates." (Doc. 312). In response to this Order, the Bart defendants concluded in their brief that "there is no conceivable effect on the administration of the bankruptcy estates of any of the debtors 'at issue' in the adversary proceeding." (Doc. 332, p. 3). Gallagher filed a 14 page brief which discusses any number of topics, but he does not appear to dispute the proposition that the Court's ruling on the cross-claims will not have any effect upon any of the bankruptcy estates in suit. Therefore, the Court finds that it does not have "related to" jurisdiction over the cross-claims.

B. GALLAGHER'S ARGUMENTS

Gallagher has filed a 14 page brief in response to this Court's April 12, 2006 Order. As the first 7 and one-half pages of that brief have nothing to do with the question at hand, that argument need not be considered here. In Part III of Gallagher's brief, he argues that the Bankruptcy Court has "arising in" and "arising under" jurisdiction, pursuant to 28 U.S.C. § 1334(b). The question of this Court's "arising under" jurisdiction is discussed in part III(A)(1) above and its "arising in" jurisdiction is discussed in part III(A)(2) above.

In Part III of his brief, Gallagher discussed the issues of core and non-core jurisdiction. Once a Bankruptcy Court determines that it has subject matter jurisdiction, it will then consider whether the matter at hand is core or noncore. In core proceedings

the Bankruptcy Court may enter a final order. 28 U.S.C. § 157(b)(1). If a matter is a noncore proceeding, the Bankruptcy Court must submit proposed findings of fact and conclusions of law to the District Court. 28 U.S.C. § 157(c)(1), unless the parties consent, and a final order may be entered by the Bankruptcy Court. 28 U.S.C. § 157(c)(2). On the other hand, if a Bankruptcy Court determines that a matter does not fall within its subject matter jurisdiction, the question of whether it is core or noncore does not arise. As this Court has determined that it does not have subject matter jurisdiction over the cross-claims, the core versus noncore distinction is not germane.

In Part IV of his brief, Gallagher argues that if this Court does not have subject matter jurisdiction over the cross-claims, that it likewise lacks jurisdiction over the Trustees' claims against him. Gallagher's argument is invalid as it merely wishes away the Trustee's case. As set forth in this Court's May 4, 2006 Memorandum Decision, the Trustee contends that Gallagher settled 33 personal injury suits, paid over the proceeds to the Debtors, and withheld attorney's fees for himself, in violation of a number of provisions of the Bankruptcy Code and Bankruptcy Rules. As these facts are presently in dispute, it will be necessary to resolve these disputed factual questions at trial. It is sufficient to state for the moment, that if the Trustee prevails in his suit against Gallagher, there will be an effect upon the bankruptcy estates in question.

In Part V of his brief, Gallagher claims that the Bankruptcy Court lacks the power to dismiss a case which is properly before the District Court on diversity jurisdiction. This Court would go further and state that it does not have the power to dismiss any case which is pending before the District Court. Gallagher appears to have forgotten that he filed his cross-claim against Bart (Doc. 38) in this Court and not in District Court.

Certainly, this Court has jurisdiction to dismiss claims that have been filed here when it finds that it lacks subject matter jurisdiction. Gallagher's argument is without merit.

IV. CONCLUSION

As the outcome of the cross-claims will have no effect on the administration of the 33 remaining bankruptcy cases, which are the subject of this Adversary Proceeding, they do not fall within this Court's "related to" jurisdiction. Moreover, as the rights asserted by Gallagher arise under State contract law, and not under Federal Bankruptcy law, they do arise under Title 11. As a final matter, the source of Gallagher's cause of action does not depend upon the existence of a bankruptcy case, but rather it depends upon his rights under his contract with Bart, his cross-claim against Bart does not arise in a case under Title 11. The same can be said of the Bart cross-claim against Gallagher. As this Court does not have subject matter jurisdiction over the cross-claims, they are DISMISSED. The Court will enter a separate order of dismissal.

May 5, 2006.

/s/ William R. Sawyer
United States Bankruptcy Judge

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